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CONTRACT LAW.

The Contract Law of all other Ancient Societies[1] but the Roman is either too scanty to furnish information, or else is entirely lost. As for the Roman law, it exists in its original entirety—a fact which one might infer from the circumstance of the very science of law being a Roman creation. The history of the change in the Roman Law of Contracts is exceedingly instructive. At the earliest dawn of jurisprudence the term in use for a contract was *nexum*, and the parties to the contract were said to be *nexi*.[2] The notion of persons under a contractual engagement being connected together by a *nexum* or *bond* continued till the last to influence the Roman jurisprudence of contract,[2] and, flowing, thence it has mixed itself with modern ideas. *Nexum*, however, originally signified a conveyance of property; and when it came insensibly to denote a contract also, it is no wonder that a contract was regarded as an *incomplete conveyance*; and, ultimately, so close and constant became the association between the word *nexum* and the notion of a contract, that a special term, *mancipium* or *mancipatio*, had to be used for the purpose of designating the true *nexum*, or transaction in which the property was really transferred. Thus contracts were severed from conveyances, but it was long before the promise of the contractor was deemed more sacred than the formalities with which it was coupled.

1. Sir H. S. Maine states that in India 'there was some law of contract and some law of crime.' At any rate contract law of some kind or other forms a part of ancient Hindu Jurisprudence.

2. The more modern view is that the present law of contract is a development of the verbal contract of *stipulation* of the Roman Law which has no connexion with the *nexum*—see Pollock's Notes to Chapter IX of Maine's Ancient Law, pp. 54 and 55. See also Muirhead on Roman Law, p. 145, and Chapter V, S. 39, pp. 213 to 219:—ED.

The analysis of Agreement which is the most beautiful monument of the sagacity of the Roman Jurisconsults is based on the theoretical separation of the Obligation from the Convention or Pact. "A pact", says Sir Henry Maine, "was the utmost product of the engagement of individuals agreeing among themselves, and it distinctly fell short of a contract. Whether it ultimately became a contract depended on the question whether the law annexed an obligation to it. A contract was a pact (or convention) *plus* an obligation. So long as the pact remained unclothed with the obligation, it was called *nude* or *naked* ".[1] Thus, *nudum pactum* does not mean a promise unsupported by a consideration, but a contract destitute of certain essential formalities. Here it may not be amiss to notice the distinction which the Roman jurisconsults made between Natural and Civil obligations. Any agreement binding according to positive morality, but not enforceable according to the strict civil law, did not give rise to an *obligatio* at all. By looseness of thought and abuse of a legal term, it was said, however, to create a *naturalis obligatio*. But every *civilis obligatio* was the ground of a civil action ; and this is why the Roman jurists treat of obligations and actions as correlatives. Natural obligations, unless supported by the prætor, gave rise to no action at all, but effect was given to them, so far as could be done, by making them serve as exceptions, that is, as defences or pleas.[2] Thus, though nothing but a contract could be the foundation of an *action*, a mere Pact or Convention could be the basis of a *plea*. An action for the recovery of a debt, for instance, could be met by showing a mere informal agreement to postpone the payment.

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1. *Ancient Law*, p. 332. Mr. Sykes, however, observes that this view of the law is utterly opposed to the whole theory of *obligatio* and leads to confusion. If the parties were contracting according to the civil law so soon as ever they had done what was required by that law, the *obligatio* arose, and their agreement was a contract, and not a mere pact : it never for one instant remained shivering nude or naked and unclothed with the *obligatio*. That which was once a mere pact remained so, and never became anything else. *Essay on Contract*, Calcutta Review, Vol. LX, 1875, p. 263. In regard to *nude* agreement the maxim of the Civil law is *Ex nudo pacto non oritur actio*.

2. *Ortolan's Commentary*, Vol. iii, pp. 181-182. By the last change that was made in the ancient law of contracts, pacts which had not matured into contracts but were founded on a consideration *(causa)* were allowed to be made grounds of equitable actions.

An obligation is defined by the Roman lawyers as the *Juris vinculum*. It is the "bond" or "chain", with which the law joins together persons or groups of persons, in consequence of certain voluntary acts. The Pact, it is to be remarked, does not draw to itself the obligation in consequence of any *moral* necessity; it is the law which annexes it in the plenitude of its power. The law *bound* the parties together, and the chain could only be undone by the process called *solutio*, an expression still figurative to which the English word "payment" is only occasionally and incidentally equivalent. "Obligation" in Roman law signifies rights as well as duties,[1] the right, for example, to have a debt paid as well as the duty of paying it, and thus the entire picture of the "legal chain" is presented before the eyes.

The convention, when it was completed, was not at once crowned with the obligation; something more than a perfect agreement was required to attract the obligation and to convert the convention into a contract. Thus in the Roman *contractus*, there are three principal parts, namely, first, *pollicitatio* or offer by one party for the acceptance of the other; secondly, *conventio*, pact or agreement on the terms, ending in the consent of the party; and, thirdly, *obligation* or binding force imposed by law, on the requisitions of the law being complied with.

The famous classification of contracts by the Roman jurists into four sorts, namely, the Verbal, the Literal, the Real, and the Consensual[2] owed its origin to the difference in the formalities which were required in each of them over and above the mere

1. The word 'liability' is used to describe the condition of a person who has a duty to perform, whether that duty be a primary duty or a secondary duty, or a sanction of one. Thus we speak of the liability of a trustee to perform the duties of his trust: of a contractor to perform his contract of one who has broken his contract to pay damages. The expression "liability *ex contractu*" as distinguished from "liability *ex delicto*," signifies the condition of a person who is under the primary duty to perform a contract. If he fails to do so, he comes under another liability, namely, under a duty to make compensation. Sir W. Markby's *Elements of Law*, p. 297, 5th Ed.

2. This is the order in which Sir H. Maine places the various forms of contract known to Roman Law. (Ancient Law, p. 325). But it is hardly correct to say that "the verbal contract was the most ancient of the four." The form of contract for things *nec mancipi* was the real; and property in *res nec mancipi* sprang up long before we have any mention of the contract *verbis*. (Ortolan's Comm., Vol. I, pp. 133, 136.)

agreement of the contracting parties. In fact, these several kinds of contracts mark the lopping off of the ceremony of *nexum*. In the verbal contract as soon as the convention was effected, a form of words had to be gone through before the *vinculum juris* was attached to it. Gibbon very beautifully describes this sort of contract. He says :—"The Goddess of faith (of human and social faith) was worshipped, not only in her temples, but in the lives of the Romans ; and if that nation was deficient in the more amiable qualities of benevolence and generosity, they astonished the Greeks by their sincere and simple performance of the most burdensome engagements, yet among the same people, according to the rigid maxims of the patricians and decemvirs, a *naked pact*, a promise, or even an oath, did not create any civil obligation, unless it was confirmed by the legal form of *stipulation*. Whatever might be the etymology of the Latin word, it conveyed the idea of a firm and irrevocable contract, which was always expressed in the mode of a question and answer. 'Do you promise to pay me one hundred pieces of gold ?' was the solemn interrogation of Seius. 'I do promise' was the reply of Sempronius. The most cautious and deliberate consent was justly required to sustain the validity of a gratuitous promise, and the citizen who might have obtained a legal security incurred the suspicion of fraud, and paid the forfeit of his neglect. But the ingenuity of the civilians successfully laboured to convert simple engagements into the form of solemn stipulations. The Prætors, as the guardians of social faith, admitted every notional evidence of a voluntary and deliberate act which in their tribunal produced an equitable obligation and for which they gave an action and a remedy.[1]" Full effect was given to the words of the *nuncupatio* and on their being rightly pronounced, the *obligatio* or *vinculam juris* sprang up *co-instanti* and *ipso facto*. By the bye I would observe that in a Roman contract the *promisee* is the person who is primarily alluded to, and in this it differs from English law which always regards the contract, if we may say so, from the point of the *promisor*.

The next step in the History of Roman Contract was when the form of words required in the contract *verbis* was dispensed with on the condition of the contract *literis* being duly performed. A

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[1] *Decline and Fall of the Roman Empire*, Vol. II, p. 668, Chandos Library.

contract was formed *literis* when it originated in an entry in the domestic account-books of the creditor with the consent of the debtor. The duty of keeping correctly these domestic account-books was one, any breach of which on the part of a Roman citizen was regarded almost as an impossibility. Passage after passage might be cited from the orations of Cicero, indicating that these domestic tables or books were of a quasi-religious and public character, and not likely rashly to be tampered with. In their nature then, they formed a guarantee very strong and convincing indeed.[1]

The further advance was when, as regarded those agreements which had for their object the delivery of a specific thing, simple delivery of the *Res* or thing which was the subject of the preliminary engagement, was enough to create the obligation.[2] The real contract shows a great advance in ethical conceptions. For, that the obligation was drawn as soon as the delivery had actually taken place, was done evidently on ethical grounds. Thus, for the first time, then, moral considerations appear as an ingredient in Contract Law, and the Real Contract differs from its two predecessors in being founded on these considerations.

The next and last step was when *certain* contracts, four in number, were singled out on account of their social importance and allowed to be entered into without any ceremony whatsoever; the obligation at once arising on the signification of the consent of the parties *ad idem*. These contracts were designated *Mandatum*, that is, Commission or Agency; *Societas* or Partnership; *Emptio Venditio*, or Buying and Selling; and *Locatio Conductio*, or Letting and Hiring. The *consensus*, or mutual assent of the parties, is the final and crowning ingredient in the convention, and it is the peculiar characteristic of agreements falling under one of these heads that, as soon as the assent of the parties has supplied this ingredient, there is at once a contract. Thus, the term 'Consensual' does not involve the slightest anomaly, but is exactly analogous to Real, Verbal, and Literal, which explain themselves.

As the contracts styled 'consensual' have reference to daily concerns of life, they were very properly relieved from technical

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1. Sykes's *Essay on Contract*, Calcutta Review, Vol. LX, p. 260 (1875).
2. Maine's Ancient Law, p. 331.

incumbrances.[1] This was not only the case in Rome but also in other parts of the Empire. Such contracts became very popular, and, accordingly, following their usual practice, the Romans distinguished them as contracts *Juris Gentium*. Although the consensual contracts were the latest born into the Roman system, yet the expression *Juris Gentium*, which attributes them to the "Law of Nations" has in modern times produced the notion of their extreme antiquity, probably from the fact of the "Law of Nations" having been converted into the "Law of Nature."

The consensual contracts, it will be observed, were extremely limited in number. But it cannot be doubted that they constituted the stage in the history of the contract law from which all modern conceptions of contract took their start. The notion of the will alone constituted the agreement, external acts being only regarded as symbols of the internal acts of volition. We have now certain contracts where the agreement of the parties alone is enough, and we have others in which the law prescribes various formalities and which the law requires to be entered into according to the rules of pre-appointed evidence. The Indian Contract Act deals with the former class of contracts, namely, consensual contracts, the contract of Indemnity and Guarantee being, as it seems, included in *Locatio*.

The Indian Contract Act is a remarkable piece of legislation. An immense deal of labour and talent contributed to produce it. Indeed, no pains were spared to make it a complete and perfect thing so far as it went. Though it was drafted by the Law Commissioners in 1866, still it did not become law until 1872. As Mr. Sykes in his "Essay on Contract" to which we have already referred says: "Drawn by the most distinguished English lawyers, it was before all the local Governments for the expression of opinion upon it by all classes of officers and judges; it was considered

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1. Modern English law requires no formalities to make a contract enforceable, unless in certain special cases. These exceptions are the following :—

(a) Contracts within the Statute of Frauds.

(b) Contracts of Corporations which must be made under their Common Seal, except in cases of "convenience amounting to necessity."

(c) Negotiable instruments which must, of course, be in writing.

(d) Cases of transfer of ships, assignment of copyright, and ratification of debts barred by the Statute of Limitations, in all of which writing is required. Vide Art. Contract in Ency. Britt.

by no less than three Committees, had its contents examined at length in a discussion between the Government of India and the Secretary of State; it was in the hands of two Legal Members assisted by two Secretaries to the Legislative Department, and it was scrutinised in every detail and almost in every word with the most minute care by several of the most eminent merchants of Calcutta.[1]"

The result has been that the Act, to use the words of Mr. Maine, "leaves nothing to be desired in point of simplicity and comprehensiveness, in respect of the essential equity of its provisions, and in respect of the perspicuity with which those provisions are set forth." The form of the Act is that of the most important Indian Codes; the Act consisting not merely of direct enactments in general and abstract terms, but of such enactments aided and explained by an application of them to concrete cases. These Illustrations have the authority of the Legislature as much as the Enactments which they explain, but they were never intended to have any force in altering the clear meaning of a section.[2] This notable feature in Indian legislation owes its origin to Macaulay, who, in his famous Code which bears the name of Penal Code first introduced Illustrations with a view to explain any obscurity which might exist in the wording of the section. In the present Act, that most desirable method has been to a certain extent overdone. Many of the Illustrations appended to the Sections seem to be unnecessary. To give the reader an idea of what I mean, I would refer to Illustrations attached to Sections 21, 31, 49, 58 and 70. The Sections to which they are attached are clear enough, so that they need not require to be made plainer; that would be what is called over-doing a thing, or, to use a poetical expression, ***gilding refined gold***. We might go through the Act and pick up other instances. But those we have already cited are sufficient for our purpose; and when one reads them, one is compelled to agree with the learned ***Westminster Reviewer*** who speaks of these Illustrations used in the Indian Acts as legal curiosities which seem to betray in the celebrated draftsmen who framed the Code, or in

1. See Abstract of Proceedings of the Council of the Governor-General of India assembled for the purpose of making Laws and Regulations, 1872, Vol. XI, pp. 322, 323.

2. See First Report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, 1864, pp. 7-9.

the Legislature which adopted them a singular diffidence in the clearness of its language, or a distrust of the capacity of those who are to expound it.[1] It is an axiom of legislation that whatever is unnecessary is bad It destroys clearness by making it more clear, and it creates unnecessary expense. But this is not all. Being an excess, it is a defect in the piece of legislation viewed as a work of art, and breaks its symmetry. As to other Illustrations, most of them are concrete forms of well known and most useful case-laws. These, no doubt, may be of some use to Judges who are not well read in law, but they are almost useless to trained lawyers. Thus, it appears that the Act might have been considerably reduced in bulk by omitting some, if not most, of the Illustrations.

There is one very remarkable feature in this Indian Contract Act, and that is the attempt it makes to codify law and equity together in reference to the subjects of which it treats. In England such an attempt would be unspeakably difficult, if not absolutely impossible. It would be an attempt to consolidate things in their nature seemingly incapable of perfectly coalescing. But in India where equity has not become so hard or fixed as English equity, the case is, no doubt, somewhat different, but is not altogether free from difficulty, for equitable principles when governed by legislative enactments and legal rules lose a considerable portion of their elasticity. " Where," said Lord *Talbot* in *Heard* v. *Stamford* [2] " a particular remedy is given by the law and that remedy bounded and circumscribed by particular rules, it would be very improper for this Court to take it up where the law leaves it, and extend it further than the law allows." To illustrate the difficulty in question, let us refer to the Act. There are certain things which are undefinable in their nature, and any attempt to circumscribe them within bounds would certainly prove a failure. The word 'fraud' is one of those things. Fraud is Protean in its aspects, so that if one were to try to limit it by a hard and fast definition he would be attempting an impossibility. Some such attempt, however, has been made in this Act. It is true, the definition given in it is a wide one; but still it is to be read strictly, as any other enactment, and if read

1. *Westminster Review*, January, 1862. 2. (1735) 3. P. Wms. 409.

in that way, it is sure to be found wanting in some cases. "Fraud," says Parke, "is infinite, and were a Court of Equity once to lay down rules how far they would go and no further in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive."[1] This, like many other circumscriptions of equitable principles, as current in India, is justified on some such grounds as that "our Judges are not as a rule Jurists," and that "loose law-making is specially out of time and out of place at present in India."[2] However good and reasonable definite rules may be in some cases, such rules only fail of the desired effect in others where, from their very nature, they are not susceptible of such limitations and circumscriptions. Surely, it would be as vain to confine "fraud" within certain bounds as it would be to define for all time to come the course of such a treacherous river as the Padma.

The substance of the law is mainly drawn from the law of England of which more than half is devoted to the subject of contract.[3] This importation from foreign law was almost a matter of necessity. As the Law Commissioners have described it, the state of the Law of Contract in India was then in this wise:—"Within the limits of the Presidency Towns the decision of suits of the nature is principally governed by the law of England, and everywhere else the judge is to a great extent without the guidance of any positive law beyond the rule that the decision shall be such as he deems to be in accordance with justice, equity, and good conscience." Sir H. S. Maine very properly observes on this that "the decisions assumed to be dictated by justice, equity and good conscience, have of late years been much affected, as a fact, by the English Law of Contract as gathered from the ordinary text books in use among English practitioners." Thus, it appears that, looking to the state of the law as it existed in

1. See History of Chancery Appeals, p. 508.

2 See Abstract of Proceedings of the Governor-General's Council, etc., Vol XI, p. 356.

3. This is as it should be, considering the wide range and constant application of the Law of Contract. The simplest accounts are riddled through and through with contracts. They ramify into a thousand affairs of importance in our time. And when one is concluded, it is only in order that another one may be begun.—Jelf's *Where to find your Law*, p. 56.

India at the time, and also bearing in mind the fact of contract being the branch of law on which men of all times and races have come most nearly to identical conclusions,[1] the Law Commissioners were perfectly justified in drawing largely upon the English law, seeing that it has dealt with the subject of contract in a most elaborate and exhaustive way. But though their draft of the Act consisted in the main of English law,[2] still it was put in a simplified form and altered in some particulars so as to accommodate it to the circumstances of the country.

The principal changes, introduced into the English law of contract, considered as the basis of the Indian measure, are these:—

(1) The provision of the English Statute of Frauds requiring certain contracts to be in writing not being suited to the habits and condition of the people of India has not been adopted.[3] Here in India, oral agreement is the rule, and writing only an exception. But the case is otherwise in England where the said statute is so highly appreciated and valued that it has been eloquently described as an Act "every word of which is worth a subsidy."

(2) In England distinction is made between writings under seal and writings not under seal, and very great importance is attached to writings of the former kind. In India, however, there is, strictly speaking, no such thing as a writing under seal, in the English sense of the term, and, accordingly, promises made without valuable consideration are not to be deemed binding simply because of their being expressed in writings under seal; in order to give validity to such promises it ought to appear that they were made *with due deliberation.* This object may be attained by providing that such promises shall be binding only when

1. It is fortunate, observes Mr. (afterwards Sir) Arthur George Macpherson, that with regard to the most ordinary contracts, there is a large amount of substantial agreement between all systems of law, including those of the Hindus and the Mahomedans (Preface to his *Outlines of the Law of Contracts*, 16th Nov. 1869). See also Sir W. Jones's "Introduction to the Speeches of Isæus" as quoted by Addison in his Preface to the first edition of his treatise *On Contracts.*

2. As Sir H. S. Maine says that the contract law of India, owing to there having been hardly any law of that kind in it, became substantially English (see his article "The Theory of Evidence" in the *Fortnightly Review* for January 1873, pp 298, 299).

3. See Ss. 10 and 11.

they are given in writing, for some good consideration, and are registered with the permission of the promisor, according to the provisions of the Registration law in vogue. Accordingly, S. 25 was framed and inserted in the Act.

(3) A very important departure from English law and a very wise one, is made in that part of the Act[1] which relates to the *time and place of performance of contracts.* By the rule of English law, in certain cases of contract, when no time is fixed for performance, the performance is yet due as soon as the obligee shall desire it. This looks like an absurdity and, therefore, AUSTIN has, for every good reasons, laughed at such an absurd rule. Surely, without an intimation of the wish of the obligee for performance, the party obliged could not possibly know that he was breaking his obligation. A previous demand would be necessary. To say that the action is itself a demand would be assigning a reason which forgets that the right of action is founded on an injury.

(4) By the English law a promise by a creditor to give time for the payment of an existing debt, or the acceptance by him, in full satisfaction of his demand, of a smaller sum than that which is due to him, is *not* binding on him unless there has been some *new* consideration given for it, such as an undertaking to give an additional or different security, or to pay the debt in a manner or at a time more advantageous to the creditor than that originally agreed upon; or unless the creditor's engagement to take less than his due or to give time, be contained in a composition deed or agreement entered into by the debtor with his creditors generally. A slight variation of the terms of the contract being sufficient to satisfy these conditions, the Act, by S. 63, very properly provides that a person who is entitled to claim performance of an engagement, may dispense with or remit such performance wholly or in part, or may accept instead of it any satisfaction which he thinks fit.

(5) It was a maxim of the law of England that, when a man, not the owner, sold goods to another, the owner retained the ownership, notwithstanding his loss of possession and the subsequent sale. To this there is an exception in the case of sale in

1. See Ss. 46 (*o*) and 50.

market overt[1] which transfers an indefeasible title in the goods sold to vendee. The hardships which a *bona fide* purchaser would suffer, were he to be deprived of what he bought, being greater than that suffered by an innocent owner who is very often justly chargeable with remissness or negligence in the custody of the property, the Indian Act has, by S. 108, provided that the ownership of goods may be acquired by buying them from any person who is in possession thereof, if the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them. Similar provisions have been inserted to meet the cases of those who have purchased goods or taken them by way of pledge from persons in possession of *any documentary title* to the goods, where the circumstances are not such as to raise a reasonable presumption that the person in possession has no right to sell or pledge them. (See S. 178).

(6) According to English law, where the buyer, in consequence of the invalidity of seller's title, is deprived of the thing sold, he cannot claim compensation from the seller for loss thereby caused. The Act provides that in such cases the seller shall be responsible, unless a contrary intention appears by the contract. (See S. 109).

(7) The Indian law does not adopt the distinction which the English law makes between penalty and liquidated damages, but simply requires the payment of the sum specified in the contract as being payable to the utmost in case of its breach. (See S. 74).

(8) By the English law a creditor who makes a composition with, or agrees to give time to, or not to sue, the principal, may yet reserve his rights and remedies against the surety. The Indian law under such circumstances would discharge the surety altogether. (See S. 135). So, where there are co-sureties, a release of one of them by the creditor shall not, under the Indian

1. As to the rule of market overt Dr. W. Stokes says .— "The Hindu law has a curious and by no means inequitable rule on the subject. The real owner can always receive the goods from the purchaser who again can recover the price from the seller. But when the purchaser has bought *bona fide* in open market and cannot produce the seller, the owner can only recover on payment of half the value." See Proceedings of the Council of the Governor-General of India, dated the 6th December, 1867.

law, discharge the others, nor free that one from responsibility to them. (See S. 138.)

(9) Where two persons are primarily liable to a third person, any arrangement made between them shall not bind him, even though he was aware of its existence, unless he was a party to the arrangement. (See S. 132). This, it is to be observed, was the old and simple doctrine of the Common Law before it was modified by Courts of Equity.

(10) The English doctrine as to the degrees of care which a bailee is to be expected to exercise, has not been adopted in the Act. (See S. 151).

(11) Where the bailee's goods have, without the consent of the bailor, been mixed up with the goods of the latter so that they cannot be separated, English law gives the whole to the bailor. This rule, somewhat hard as it is, has not been adopted in the Indian law which provides that in such cases the bailor is only entitled to receive compensation. (See S. 157).

(12) According to English law, when there is any partnership property, the separate property of any partner must be employed in the payment of his separate debts, and the surplus, if any, in the payment of the partnership debts; but when there is no partnership property, the separate property of any partner must be applied equally in the payment of all the partnership and separate debts for which such partner is liable. It thus depends upon the existence or non-existence of partnership property, no matter how small in amount, which of the two rules is to govern the division of the separate property of the partners. The rule first stated, being more equitable, has been adopted, whether there is any partnership property or not. Indeed, "in Contracts with a firm partnership property is primarily looked to; in dealings with a partner with which the firm has nothing to do, all that is looked to is his own sufficiency." (See S. 262).

The above are the principal changes which have been introduced into the English law. Changes are too often bound to be unsatisfactory, but the changes made by the Law Commissioners in the drafting of this very important Act—a very jewel in the cabinet of the Indian Statutes—are changes for the better, and show sound wisdom, wide experience and judicial discretion

in the framer. It is also worthy of notice that in the sea of Contract Law, as the English law on the subject may fitly be so described, they have steered clear of the shoals and sandbanks, and have guided their vessel to its destination without encountering much difficulty in the way. They have dealt with the law in such a manner that instead of yielding implicit obedience to authority where it does not strictly follow the dictates of reason and equity, they have not hesitated to give the go-by to it and to be actuated by a sense of justice and the peculiar circumstances of the country for which the enactment was made. Thus the Act, so far as it goes, has been attempted to be made just, equitable and practical, and the attempt, it is gratifying to observe, has not been made in vain.

The Indian Contract Act is not, and does not pretend to be, a complete Code upon the branches of the law to which it relates. It consists of eleven chapters, of which the first six lay down the general principles on which all contracts are based, thereby treading over grounds which have been so minutely and elaborately explored by LEAKE, POLLOCK and ANSON.[1] After laying down the principles governing contracts in general, the Act deals specially with the five most important subjects which come under the head of consensual contracts of the Roman Civil Law. The consideration of contracts generally is rightly made to come first, for then what is applicable to all the succeeding chapters can be stated once for all; and such arrangement, to use AUSTIN'S words, tends greatly to clearness. The subjects treated of in the last five chapters were chosen as being of the most frequent occurrence. But they cover only a portion of the ground which falls within the limits of the Law of Contracts, and even those that are treated of in the Act are not in all respects treated exhaustively. Indeed, almost all the subjects dealt with have been left in an imperfect state. This, however, one must admit that, so far as they go, they are full and complete.

But though the Act does not treat of all sorts of contracts still, so far as it goes, it applies to the whole of British India, and, in this sense the propriety of its title, wide as it is, may well be defended. But the Act, though it bears a very high title, is not

1. Addison *On Contracts*; Smith *On Contracts* and Chitty *On the Law of Contracts* are also works of considerable note.

a drastic measure; it has no iconoclastic tendency, and the few enactments which it wipes out of the Statute-book it does so expressly and in definite terms, repeal by implication being absolutely discountenanced. Nor does the Act interfere with any usage or custom of trade[1], or with any incident of any contract which is inconsistent with its provisions. This non-interference is absolutely necessary from the very nature of the thing, otherwise all mercantile transactions which form, as it were, the *corpus* of the law of contract, would be thrown into the utmost confusion, and any regularity which the Act may aim at establishing would be seriously jeopardised.

In order to the proper understanding of an Act, it is necessary to have a clear and distinct idea of the terms which are used there in a peculiar sense. Accordingly this Act begins with what is technically called an 'interpretation clause', which deals with definitions. Three definitions are confined to the component parts of a 'Contract.' There are, it is true, some other definitions which are given in the body of the Act, but they are not of so great importance as those which are given in S. 2. The first step towards making a contract is for the parties to get into communication with each other. This is done by one of them taking the initiative and making a 'proposal' to the other. This consists of an intimation by one person to another of his willingness to do 'or to abstain from doing' something, made with a view to obtaining the assent of that other person to that act or abstinence. There must be an offer to do or not to do something, and that offer must be made for the purpose of being assented to. Thus, a proposal is very different from a mere statement of fact, where no assent is sought for the performance or non-performance of the act stated. In fact, the seeking the assent of the other party is the one thing needful in a proposal, properly so called. 'I am willing to go to England' is not a proposal unless it be made with the view of obtaining the assent of the party addressed; but 'I am willing to go to England on your undertaking to pay for my passage' is a proposal, in as much as it is made with

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1. Not only trade customs but customs in general have immense influence in India. There is probably no country in which custom is so stable as it is in India; and as a matter of fact, in India customary law is of very great antiquity. (See Maine's *Village Communities*, pp 9, 65).

that view. A proposal may be made in words or otherwise. (S. 9.)

The next step is when the purpose for which the proposal is made is answered, that is, when the assent is given; so long as that is not given, the proposal remains a mere proposal[1], but the moment the other party expresses his concurrence in the act or abstinence proposed, the character of the proposal is altered and it becomes a 'promise' whereby a relation is established between the person making the proposal, who is now called the 'promisor'[2] and the person accepting the proposal, who is called the 'promisee.'[3] The effect of this relation is that thereby a right is created on the one hand and a duty on the other. The nature, extent, and results of these rights and duties it is the province of the Law of Contract to define.

Now, the person who makes a promise to another, generally does so with a view to some advantage which that other person is capable of conferring upon or procuring for him. The promisee either does or promises to do something which the promisor wants to be done; or he abstains or promises to abstain from something which the promisor wants not to be done, or he has, previously to the promisor's promise, but at his desire (express or implied), so done, abstained, or promised to do or abstain. This act, abstinence or promise is the object which led the promisor to make the promise, and is defined as the 'consideration'[4] for it. This consideration, as will be seen later on, forms an essential part of a valid contract.

Since it is assent that converts a proposal into a promise, it follows that every promise is an 'agreement', or union of minds, and when the consideration for a promise is another promise, the agreement consists of a set of promises, each one being the consideration for the other. Promises which form the consideration

1. Such a naked offer is called *pollicitatio* in the Roman law.

2. Otherwise called, 'obligor,' 'debtor' or 'contractor'.

3. Otherwise called 'obligee', 'creditor' or 'contractor'

4. The modern English doctrine of consideration has been one of gradual development. In the time of Henry VI, the word does not seem to have been in vogue; the equivalent found in cases of that period is *quid pro quo*, and that phrase conveys an accurate idea of the connotation of the modern word, except indeed as used by conveyancers in conjunction with *good*. Consideration, as Mr. Broom says, could not have been better defined than it is in the Indian Contract Act. See p. 569.

for each other, that is, where each of them is the consideration for the other, are called reciprocal promises.

From the mere fact of an agreement being entered into, it does not follow that it is enforceable by law. Indeed, there are numerous agreements which are discountenanced by law on moral, political, or social grounds, and are, as a matter of fact, denied legal force and effect. Agreements which are not so enforceable by law are said to be 'void', while, on the other hand, agreements which are so enforceable, are defined as 'contracts.' Thus agreements or covenants comprise both contracts and facts. Wherefore it is manifest that though every contract is an agreement, every agreement is not a contract.

Contracts are, again, divided into 'voidable' and 'void,'[1] though the latter term is not quite happy. An agreement which, from the circumstances of the case, is enforceable by one of the parties to it, but not by the other, is called a 'voidable' contract. This voidability may attach to the agreement from the very beginning, or it may come in subsequently. Ss. 19 and 39 furnish instances of contracts which are voidable *ab initio*, and Ss. 53 and 54, of contracts which become voidable at a subsequent time. Strictly speaking, no contract can be said to be void *ab initio*, such a supposition being precluded by the very nature of a contract. But a contract may, under some circumstance happening afterwards, cease to be enforceable by law and thus become void. In such a case the expression 'voided contract' would be more appropriate. Agreements which are absolutely void cannot, it is true, be called contracts; but agreements which are only relatively void, that is, which, as regards others, take effect, may well be so called. For instance, a Bishop's lease, exceeding the period prescribed by the law, is good as against the Bishop, but not as against his successor. The case of a Matwali granting a lease in perpetuity comes within the same category. So, in ***Bahadur Singh* v. *Mohar Singh***[2] the Privy Council have held that a contract between the life-tenant and the then expectant heirs with *spes successionis* that the life-tenant is entitled absolutely is not binding on the persons who became heirs when the

1. (1901) 29 I.A 1 ; 29 A. 94.

2. For remarks on these two terms see Sir William Markby's *Elements of Law*, 5th Ed., p.p. 142,143.

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succession opened out. Similarly a Ghatwal is, as a general principle, not competent to grant a lease in perpetuity, and his successor is not bound to recognise such an incumbrance —*Narain Mullick* v. *Badi Roy*.[1] The Ghatwal himself would be bound by such a lease, but not his successor who would be quite competent to cancel it.

After giving a general idea of what a contract is, the Act proceeds (Chap. II) to treat of it in detail, that is, of the ingredients of which it is composed. These are stated in S. 10, and they may be arranged under six different heads. As I have already observed, every contract is an agreement, but every agreement is not a contract. An agreement, in order to be a contract, (1) must be made by the free consent of the parties to it; (2) those parties must be legally competent to contract; (3) the consideration for the agreement must be lawful; (4) the object of the agreement also must be lawful; (5) it must not be of those classes of agreements which are expressly declared by the Act to be void; (6) it must not contravene any law in force in British India, by which any contract is required to be made in writing, or in the presence of witness, or any law relating to the registration of documents.

These points not being easy of comprehension are next specially dealt with. One of the essentials of a contract is that the parties to it must be competent to enter into such a transaction. And, accordingly, the Act defines who such a person is. This definition is given in S. 11 where a 'competent person' is stated to be one who is (1) of the age of majority according to the law to which he is subject; (2) of sound mind; and (3) not disqualified from contracting by any law to which he is subject.

The subject of 'majority' being sufficiently dealt with in the Indian Majority Act (IX of 1875), the present Act is silent on the point, but it does give a definition of 'sound mind' (S. 12) as being the state of mind of a person who, at the time when he makes a contract, is capable of understanding it and of forming a rational judgment as to its effect upon his interests. Thus, one who is merely capable of understanding what he is about, is not a man of sound mind within the meaning of the Act unless

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1. (1901) I.L.R 29 C. 367.

he, at the same time, be capable of forming a rational judgment as to its effect upon his interests. But there is nothing in the Act to prevent one who is usually of unsound mind from entering into a contract during his lucid intervals. Nor, on the other hand, would one who is usually of sound mind be deemed competent to make a contract at any time when he happened to be of unsound mind, as, for instance, during intoxication. The point to be looked at in each instance is the contracting party's capacity at the particular time, to know what he was about and how the transaction would affect his own interests. No such consideration, however, is necessary in the case of an idiot or life-long fool who is never of sane mind. The other kind of disqualification referred to in the section may be instanced by the case of a wife governed by English law, who under coverture is not competent to contract, or of an alien prohibited by the law for the time being from contracting, or of certain persons who are declared to be disqualified under special laws.

The 'freedom of consent' is next dealt with in the Act. Indeed, this is the main essential of a contract, and forms, as it were, the corner-stone on which the whole thing rests. When two or more persons agree upon the same thing in the same sense, they are said to consent (S. 13). The thing must be one and the same, and it must be viewed by both parties in the same light. A mere verbal coincidence of terms would not do, as two things like two persons may have the same name. In order to constitute such consent as is necessary for a contract, it must be shown that the parties were *ad idem*, that is, their minds did, in point of fact, concur in the matter with which it deals. In applying this rule, however, regard must be had to the principle of law which precludes a person from asserting that his meaning was otherwise than what his words clearly convey; and, in the case of written agreements, to that rigid rule of interpretation, which precludes a party to a written contract from adducing evidence other than the document itself for the purpose of showing that it meant something different from what is expressed in it.

Consent generally means free consent, but lest there be some mistake about the matter the Act, to make assurance doubly sure, distinctly states that the kind of consent which is necessary

for the making of a contract is free consent, and it defines such consent [1] as one which is not caused by coercion, undue influence, fraud, misrepresentation or mistake. Now, these terms being very liable to be misunderstood and, therefore, misapplied, the Act takes good care to explain them as clearly as possible. 'Coercion' is defined (S. 15) as the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of a person, with the intention of causing any person to enter into a contract. In these cases there is a clear interference by one person with the exercise of another person's will and this interference is effected in the most palpable manner, that is, the interference is direct and smacks of violence of some kind or other. A person who, under compulsion of some wrong done or threatened to his person or his property, or to the person or property of some one in whom he is interested, is made to express assent, does not, it is clear, in so doing, express his real wish and intention. His consent, accordingly, has not been 'free' but 'forced,' and hence there has been no contract. It is true, unlawful detinue of property is not a Penal Code offence, but it is expressly included in the term 'coercion' as used in this Act. Thus, the section embraces every conceivable form of improper pressure which can be brought to bear by one person on another; it does not matter whether the Indian Penal Code is or is not in force in the place where the coercion is employed. Of course, threats of *legal* means of annoyance, such, for instance, as a threat of going to law, however disagreeable, are not 'coercion.' Coercion, as here defined, differs altogether from the compulsion which will preserve certain acts from being a criminal offence under S. 94 of the Indian Penal Code, to constitute which it is necessary that there should be threats reasonably causing an apprehension of instant death.

But there are other ways of interfering with the free exercise of a person's will, which, though less undisguised and explicit than coercion, are none the less conducive to the same result. The employment of 'undue influence' is one of those ways. Where the relations subsisting between the parties are such that

1. According to the *Code Napolean* there can be no valid consent if such consent have been obtained through mistake, or have been extorted through violence or surreptitiously obtained by fraud (p. 304.)

one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other, an agreement entered into under such circumstances is said to be induced by 'undue influence' (S. 16). This is the general principle which governs such cases; and to go into particulars, it may be stated that where one person holds a real or apparent authority over the other, as in the case of parents and children, guardians and their wards, or masters and their pupils; or where he stands in a fiduciary relation to the other, and in the case of a doctor and his patient, a solicitor and his client, spiritual adviser and his disciple, or a trustee and his *cestui que trust*; or where one person makes a contract with another whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress; in any of such cases, a person is deemed to be in a position to dominate the will of another, and, accordingly, any agreement entered into under such circumstances would be wanting ' in freedom of consent.' 'Undue influence' differs, it will be seen, from coercion, in this : that 'coercion' is mainly of a physical, 'undue influence' of a moral, character. In both alike, the freedom of the will is impaired. In the case of contracts which are open to the charge of unconscionableness, the Act provides that the burden of proving that such a contract was not induced by undue influence shall lie upon the person who is in a position to dominate the will of the other.

The English Courts have, it seems, gone much further in applying the doctrine of 'undue influence' as invalidating an agreement. Thus, a father who has been forced into an agreement by the fear of a criminal prosecution impending over his son, has been considered as acting under such compulsion as to be no longer a free agent. So, also, it has often happened that an usurious transaction entered into by a young man who has borrowed upon the security of his expectations, has been set aside, notwithstandidg that the young man was of age, on the ground that it disclosed an unconscientious use of the power arising out of the circumstances and conditions of the parties, there being weakness on the one side, and extortion, or advantage taken of that weakness, on the other.

There may be also cases in which, though there has been neither coercion nor undue influence, the one party has been

induced to consent by a misrepresentation for which the other is more or less responsible. This class of cases is divided into two heads, according to the degree of culpability attaching to the person from whom the misapprehension originates: 'fraud' being the term for those cases in which there is some real culpability and a dishonest intention; 'misrepresentation' being the term when there is no dishonest intention, and little or no culpability. The general effect of each, however, is that the consent produced by it is not 'free', and the agreement, consequently unenforceable. The details of this general rule will now be considered.

'Fraud' being Protean in its aspects, the Legislature has done well in not attempting to actually define it. (S. 14). It merely specifies certain acts which, it says, are to be deemed fraudulent under certain specified circumstances. It states that in order to constitute fraud there must be either (1) the suggestion [1] of a fact as true by one who does not believe it to be true; or (2) the active concealment [2] of a fact by one who knows or believes it to be true; or (3) a promise made without any intention of performing it; or (4) some other act fitted to deceive; or (5) some act or omission specially declared by the law to be fraudulent. It is necessary, too, in order to constitude fraud, that the act should, in each instance, be done by a party to the contract, or by his agent, or with his connivance, and that it should be done with the intention, either (1) to deceive another party to the contract or his agent, or (2) to induce him to enter into the contract. Where these various conditions exist, there has been 'fraud', and if the fraud has caused the contract, the contract is not valid. If, however, the facts are such that the fraud cannot be said to have been a proximate and determining ground of the transaction, the mere fact of there having been fraud does not, *per se*, render the contract invalid.

With regard to the first form of fraud mentioned in the above list, it is to be observed that a statement may be untrue in fact, but if it is made on the belief of its truth, there is no fraud; the case would be one of mistake, pure and simple. The culpability consists in the non-belief of its being true. Besides, the statement must be a statement of

1. The difference between this and a case of *suggestio falsi* is very slight.
2. The partition which separates this from a case of *suppresio veri* is very thin.

fact: a mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. Nor does misrepresentation of *law* give rise to an action of deceit.

The second form of fraud mentioned above, is active concealment, that is, when something is actually done for the purpose of concealment of a fact. Mere non-disclosure is not fraud. Indeed, there is a marked difference between active concealment and mere silence. It is one thing to take active measures to conceal a fact, and quite another merely to keep silent about it. But silence may be fraudulent, and the question whether it is so or not, depends entirely on the relation of the parties. Traders, for instance, as a general rule, deal with each other at arm's length, and are understood to be under no obligation to volunteer information about the matter of the contract. On the other hand, there are cases where it is the duty of each party to speak out, and where, accordingly, the mere failure to mention a fact may constitute fraud. Transactions, for instance, which are based on mutual confidence, such as dealings between a parent and child, a guardian and ward, a marine insurer and the under-writer, proceed on the basis that each party is bound to tell the other all he knows, and any failure to comply with this duty is culpable. In such a case the keeping silence is a breach of duty and the contract is liable to be avoided. There may also be cases where silence is, in itself, equivalent to speech. The case supposed in Illustration (*e*) is one of them. There are cases, however, where although it is the party's duty to speak, and although, consequently, his silence is fraudulent, yet the fraud does not render the contract voidable. This is so, when the party who has been misled by the silence of another had the means, with ordinary diligence, of discovering the truth (S. 19) This is the only exception to the general rule that fraud renders a contract viodable at the option of the party deceived. In any other case, existence of the means of knowledge would be no bar to the rule taking effect.

The third form of fraud noticed above may be exemplified by the case of a person buying goods with the intention of not paying for them. Here the transaction, though not actually fraudulent, is still *mala fide* and, therefore, a good ground for avoiding the contract.

The fourth form spoken of above is vaguely worded, but vague as it is, it would prove of very great use in drawing into it any form of deceit for which the preceding sub-sections have not provided. For illustration of an act or omission being declared by law to be fraudulent, see S. 24 of the Insolvent Debtors' Act, and S. 55 of the Transfer of Property Act, respectively. The maxim of law with regard to fraud is "Ex dolo malo non oritur actio"—*A right of action cannot arise out of fraud.* A marked distinction existed in the Civil law between ***dolus bonus*** and ***dolus malus***, the former being allowable in self-defence against an enemy or for some other justifiable purpose.[1]

In the next place, it is possible that one party to a contract may mislead another quite unintentionally, and be guilty, in so doing, of nothing more than inadvertence. This class of cases comes under 'misrepresentation' as described in S. 18. Under it are placed (1) the positive assertion, in a manner not warranted by the information of the party making it, of that which is not true, although he believes it to be true; (2) any breach of duty, which without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) the causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

As to the first of these three heads, it will be observed that a party may believe what he says, and so have no intention to mislead, and yet be guilty of misrepresentation, if the positiveness of the manner of his assertion is not justified by the degree of information on which he speaks. The fact of the speaker believing what he says is immaterial, if that belief is not based on proper information. The second head noticed above appears to refer to cases of non-disclosure, in which one of the parties was presumed to have had means of knowledge which were not accessible to the other, and was, therefore bound to tell him everything which might be supposed likely to affect his judgment, but failed to do so, and the result of the failure has been to gain an advantage.

SHUMBHOO CHUNDER DEY.

(*To be continued.*)

1. See Broom's Maxims, 7th Ed., p. 555.

NOTES OF INDIAN CASES.

Munisami Mudaliar *v.* **Subbarayar.**—I. L. R. 31 M. 97.—The doubt intimated in this case as to the effect of *Kearley* v. *Thomson*[1] has been directly answered by the Judicial Committee in *Petherperumal* v. *Muniyandi Servai.*[2] Their Lordships observe that the authority of the earlier decisions, *Taylor* v. *Bowers*[3], *Symes* v. *Hughes*[4], and *In re Great Berlin Steamboat Co.*,[5] "as applied to a case like the present is not shaken by the observations of *Fry* L. J. in *Kearley* v. *Thomson*[1]." We welcome the decision as settling the law for India. Even without any reference to S. 84 of the Indian Trusts Act, their Lordships recognise the distinction between cases in which the fraud has been effected and those in which it has not been carried out or has failed. The view of Mr. Kerr ('Fraud and Mistake', 3rd Edn. p. 405) is thus not adopted. The decision of the Judicial Committee on the facts of the particular case settles another question also. The benami conveyance had not ultimately defrauded any creditor, because it had successfully been impeached by a creditor, but it had prejudiced him "to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take." It was argued for the appellant that the very use of the deed in the creditor's litigation, was such an accomplishment of the fraud as would preclude a recovery of the property by the transferor. This, indeed, was the view taken by the Madras High Court in *Muthuraman Chetti* v. *Krishna Pillai*,[6] which must now be taken to have been overruled by the decision of the Judicial Committee. In the course of the argument Lord *Macnaghten* is reported to have asked whether there was any authority for such a proposition, and in spite of the reliance placed on *Kearley* v. *Thomson*[1], their Lordships have held that 'this is obviously not the law', and that the transferor is nevertheless entitled to recover. "The purpose of the fraud having not only not been effected but absolutely defeated," their Lordships say, "there is nothing to prevent the plaintiff from * * * recovering possession of his property."

For an elaborate review of the authorities on the point, reference may be made to *Jadunath Poddar* v. *Rup Lal Poddar*[7].

1. (1890) 24 Q. B. D. 742.
2. 18 M. L. J. R. 277.
3. (1876) 1 Q B. D. 291.
4. (1870) L. R. 9 Eq. 475.
5. (1884) 26 Ch. D. 616.
6. (1905) I. L. R. 29 M. 72
7. (1906) I. L. R. 33 C. 967.

Nadiar Chand Shaha *v.* **Wood.**—I. L. R. 35 C. 194.—We are unable to agree with some of the observations in the judgment of the learned Judges. The view taken by the Madras High Court in *Periannan Chetti* v. *South Indian Railway Company*[1] was based upon the decision of the Calcutta High Court in *the Secretary of State for India* v. *Dip Chand Poddar*[2] and has been followed by the Allahabad High Court in *G. I. P. Railway Co.* v. *Chandra Bai.*[3] It is difficult to understand how the learned Judges rely on the Allahabad and the earlier Calcutta case as supporting the dissent from the view of the Madras High Court as to the interpretation of S. 140 of the Indian Railways Act. The case of the *East Indian Railway Co.* v. *Jethmal Ramanand*[4] seems to us to have little bearing on the question, as that decision turned on the non-compliance with the provisions of S. 77 of the Act. That the provisions of the Act should be complied with, nobody disputes. But the question is, what are the provisions of the Act, and how are they to be interpreted ? But for S. 77, even an *oral* communication to *some* responsible officer of the Company might be a good notice to the Company—see *Truman's case.*[5] S. 77 prescribes a *written* communication. To whom is it to be addressed ? To the 'Railway Administration' which is defined in S. 3 as the 'Railway Company.' If this stood alone, there can be no doubt that any written communication which, according to general principles, will be a notice to the Company would be a sufficient compliance with the requirements of the Act. Thus, for instance, the Allahabad case, recognises, as much as the Madras decision, that a notice served at the office of the Railway Co. in London will be good, though this is not included in S. 140. It cannot be taken to be the object of S. 140 to impose further requirements *in addition* to those prescribed by S. 77. It only provides the *manner* of complying with the requirements of S. 77 and the language is clearly enabling or permissive. It does not exclude any other *manner* of service which, according to well-understood principles, will amount to a sufficient notice to the 'Railway Administration' or 'Railway Company.' Only, the section indicates that for purposes of 'imputed notice' the Agent is the *only officer*, notice to whom will amount to a notice to the Company. If 'may' in the section

1. (1898) I. L. R. 22 M. 137.
2. (1896) I. L. R. 24 C. 306.
3. (1906) I. L. R. 28 A. 552.
4. (1902) I. L. R. 26 B. 669.
5. L. R. (1894) 3 Ch 272.

is to be understood as 'imperative', the obligatory character will attach not merely to the *person* to whom notice is to be given, but also to the *manner*. But it seems to us that it would be preposterous to contend with reference to Cl. (*c*) of the section that if the letter be posted *unregistered*, it would be no notice though the Agent should admit actual receipt of it. (Cf. *Norris* v. *Pilcher.*[1]) We think that the true construction of S. 140 is that the onus which ordinarily lies on the claimant of proving notice to the Company is sufficiently discharged by proving that he has complied with the requirements of the section—see the second part of S. 142, S. 90 of the Indian Companies Act 1882 and S. 27 of the General Clauses Act, 1897. The section does not *preclude* him from showing that the notice, though otherwise addressed, directed or despatched has, nevertheless, *actually* reached the Agent or the Company. The Appellate Court in the *East India Railway Co.* v. *Jethmal Ramanand*[2] only decided that knowledge *however derived* is not a notice within the meaning of the Act and that a communication by the B.B. & C.I. Railway was not a notice *by the claimant*. And in *The Secretary of State* v. *Dip Chand Poddar*[3] the learned Judges expressly say that the objection as to notice "will be sufficiently met if it is shown that the notice served on the Traffic Superintendent reached the Manager."

Ajudhi *v.* Kunjal.—I. L. R. 30 A. 123.—The decision in this case is directly opposed to that of the Madras High Court in *Gopalla* v. *Paramma*[4] (see also *Sethu* v. *Nayana*[5]) but the Madras case is not noticed in the judgment of the learned Judges. Reading Arts. 74 and 75 of the Limitation Act together, it seems to us that there is much to be said in favour of the distinction taken in the judgment under notice between cases where the suit is for the whole and those where it is only for instalments. Without accepting the distinction drawn in the Allahabad decisions with reference to the language of the documents, between cases in which the right to sue for the *whole* on default is *optional* with the creditor and those in which it *seems* to be the only course left to the creditor, it has now been laid down by all the other High Courts that in nearly all cases of instalment bonds or decrees with a default clause it is open to the creditor to waive

1. (1868) L. R. 4 C.P. 417.
2. (1902) I. L. R. 26 B. 669.
3. (1896) I. L. R. 24 C. 306.
4. (1884) I. L. R. 7 M. 583.
5. (1884) I. L. R. 7 M. p. 577.

any particular default and that in that case the starting point under Art. 75 for any suit consequent upon a later default will be the later and not the first default. What then amounts to a waiver? In spite of the observations in *Balaji* v. *Sakharam*[1] we may now take it as fairly settled that the payment and acceptance of an overdue instalment will *generally* be regarded as amounting to a waiver of the default—see *Kashiram* v. *Pandu.*[2] But it appears to us that the Courts in India have overlooked the fact that there may be other circumstances from which a waiver may be inferred quite as well. We do not dispute the proposition that mere forbearance to sue does not amount to a waiver. But a waiver need not always be a *bilateral* act. Any act on the part of the creditor, after knowledge of the default, indicating a clear election to regard the instalment arrangement as still in force is sufficient evidence to support an inference of waiver. A suit by the creditor for an *instalment* and *not for the whole*, in spite of the default, is such an act, and such a suit will fall under Art. 74 and not Art. 75 of the Limitation Act. To take an analogy from the law of Landlord and Tenant, voluntary payment and acceptance of rent accruing due after a forfeiture is not the only kind of implied waiver of the forfeiture. A recovery of rent *in invitum*, as by distress or a suit for rent accruing due after the forfeiture, has been held to amount to a waiver of the forfeiture—see *Grimwood* v. *Moss*;[3] *Dendy* v. *Nicholl.*[4] It is only where the suit is for the *whole* amount that Art. 75 would seem to apply.

Firoji Begam v. Abdul Latif Khan.—I. L. R. 30 A. 143.—This is a hard case and we are not sure that it is good law either. The reasoning of *Lekha* v. *Bhauna*[5] is not very convincing. It is to be regretted that the new Code has not adopted the suggestion of the learned Judges that in respect of orders under S. 549 also, a provision analogous to that contained in the second paragraph of S. 381 might be made and a right of appeal given. The New Code has provided an appeal even in respect of orders under S. 136 [now Order XI, r. 21, of the New Code]. Cf. *Maharajadhiraj* v. *Mehta.*[6] Among orders which have the effect of finally terminating a suit or appeal, security orders in

1. (1892) I. L. R. 17 B. at p. 559.
2. (1902) I.L.R. 27 B 1. (F.B).
3. (1872) L. R. 7 C. P. 360.
4. (1858) 4 C. B. N., S. 376.
5. (1895) I. L. R. 18 A. 101.
6. (1894) I. L. R. 19 B. 307.

appeal are, we think, the only class in respect of which there is no further remedy—either by way of appeal or by an application to set them aside. Having regard to the other orders specified in Order XLIII, Rule (1) we do not feel certain that the legislature deliberately intended that there should be no appeal in this particular case.

Dakshina Moorthy Pillai *v.* The Municipal Council of Trichinopoly.—I. L. R. 31 M. 157.—The point raised in this case is, we are glad to see, set at rest for the future by an express provision in the new Code. The definition of 'decree' specifically excludes orders of dismissal for default. No appeal will therefore lie from them. An application for restoration is the only remedy and there is, as before, an appeal against an order rejecting it.

SUMMARY OF ENGLISH CASES.

Cox Moore *v.* Peruvian Corporation, Limited.

[1908] 1 Ch. 604.

Company—Floating charge—Specific charge with priority, if precluded.

The question in the case was whether as a rule of law it was within the power of the respondent Company after having created a floating charge over its assets, to create a specific charge over a portion of its assets taking rank in precedence to the floating charge.

Held:—Following the observations of *Jessel* M. R. in *In Re Colonial Trusts Corporation*[1] that it was within its power to do so, and that also the rule (if any) that a Company after creating a floating charge could not create a specific charge except in the course of its ordinary business applied only to trading Companies. In this case, the Court also declined to assume without evidence that what the Company was proposing to do was not in the ordinary course of its business.

Jones *v.* Pritchard. [1908] 1 Ch. 630.

Party-wall—Grant of a divided moiety—Easements implied—Absence of negligence—No liability for nuisance.

1. 15 Ch. D. 465, 472.

If a man grants a divided moiety of an outside wall of his own house with the intention of making such wall a party-wall between such house and an adjoining house to be built by the grantee the law will imply the grant and reservation in favour of the grantor and grantee, respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall. Subject to the easements of which the grant or reservation will be so implied either party may deal with his moiety in any manner he pleases, and so long as he uses the wall only for the contemplated purposes and is guilty of no negligence or want of reasonable care and precaution, he is not liable for any nuisance or inconvenience occasioned by such user. In this case the party-wall had flues and fire places on both sides, and had originally belonged to the plaintiff's predecessor in title who had made a grant of a divided half of it to the defendant's predecessor in title when he was about to build a house on an adjoining site. By reason of the cracks that developed in the masonary work surrounding the defendant's flues, smoke found its way into plaintiff's dining room and did damage. The cracks were caused by a subsidence in the defendant's house, but the cause of the subsidence was undetermined and there was no evidence of negligence on the part of the defendant. Applying the principle above stated, the defendant was held not liable for the damage.

Leschallas v. Woolf. [1908] 1 Ch. 641.

Landlord and tenant—Surrender—Right to remove fixtures—Sub-lessee's right.

This was an action to restrain the defendant (a tenant) from removing certain fixtures. The defendant was originally a sub-lessee on the premises. The fixtures had been placed by him when he was a sub-lessee. The lease contained a covenant to deliver up the premises with all the fixtures thereupon at the termination of the lease and the sub-lessee had notice of it. The defendant's lessors (the lessees) agreed to surrender their holding to the plaintiffs (of which agreement there was evidence that the defendant knew and was a consenting party) and to get rid of the sub-tenancy gave him notice to quit. However, before the time mentioned in the notice expired, by an agreement with the

plaintiffs the defendant became a tenant of the plaintiffs. In that agreement there was, however, not a word as to fixtures. After this agreement, but before the date fixed for the commencement of the new tenancy, the lessees surrendered their holding in pursuance of their agreement. Subsequently when the plaintiffs served a notice to quit on the defendant the defendant claimed to remove the fixtures which he had placed on the premises when a sub-lessee.

Held:—He was not so entitled. In so holding the Court laid down the following propositions of law—(i) The lessee's covenant to deliver is binding as against the sub-lessee. (ii) A tenant who contracts for the surrender of his lease to his landlord, is in the same position as if he had contracted to sell the lease and cannot as against the surrenderee, any more than he could against a purchaser, remove fixtures which were upon the free-hold at the date of the contract. (iii) A contract to surrender is a contract to surrender free of sub-tenancies, and a sub-lessee who consents to such surrender is precluded, even if otherwise he was not precluded, from removing the fixtures placed by him upon the premises. (iv) The tenant loses his right to remove the fixtures even when he surrenders the lease in order that a new lease may be granted if he fails to make any stipulation to the contrary. The premises *prima facie* include fixtures and the subject of the new lease is *prima facie* what is surrendered in order to be redemised.

Markham v. Paget. [1908] 1 Ch. 697.

Landlord and tenant—Implied covenant for quiet enjoyment—Derogation from grant.

In 1895, one Paget entered into an agreement of lease with a Mining Company together with the usual power of working. In 1896 Paget died, having appointed the defendants trustees and executors. In 1901, the Paget trustees carried out the agreement by two contemporaneous documents, one a lease to certain "demising trustees" on trust to grant a specific mining lease, and another a mining lease by the demising trustees. The lease contained a clause that in case of reasonable apprehension of subsidence, the Company might without paying, allow, with the consent of the demising trustees, certain amount of coal for support. In 1904,

there was a lease by the defendants in favour of the plaintiff, the defendants reserving full power to work the mines but not to let down the surface. Subsequently there was apprehension of serious damage, but the demising trustees refused to sanction coal being left for support without payment. The coal was worked and subsidence resulted with injury to the plaintiff. The plaintiff claimed damages both on the ground of derogation from grant and for breach of implied contract for quiet enjoyment.

Held—overruling the contention that the Company claimed through the testator and not the defendants—that the defendants were liable to the plaintiff on both the grounds. The right to work the mines did not include the right to let down the surface. Reviewing the authorities as to the scope of implied covenant for quiet enjoyment *Swifen Eady* J. considered that prior to *Jones* v. *Lavington*[1] implied contract for quiet enjoyment extended to a lawful interruption by title paramount during the continuance of the estate.

In re **Freeman—Shilton** *v.* **Freeman.** [1908] 1 Ch. 720.

Charity—Bequest to Charity Organisation Society—Construction.

A testator gave the residue of his estate to the treasurers for the time being of the Charity Organisation Society in London upon trust to retain 1/10th of the annual income for the society and to divide and pay the residue of the income to such other society or societies as shall, in the opinion of the governing body, be most in need of help besides fulfilling the standard of good management, efficiency and economy of such Charity Organisation Society. The question was whether gift of the residue of the income was good as a valid charitable gift. The Charity Organisation Society was admittedly a society for the relief of the poor. *Held*: the general principle being " that you must find either by express words or by necessary implication that the testator did intend the residue to be devoted to charities and if so you are entitled and indeed bound to qualify the generality of certain words which, in the absence of any such purpose, would include bequests both charitable and non-charitable," in the absence of words indicating such general intention, their Lordships held against the gift. Their Lordships could not infer such an intention from the mere

1. (1903) I. K. B. 25.

fact that the trust was a charity or from the fact that the standard of efficiency was to be that of the Charity Organisation Society in the absence of anything to show that the particular standard of management did involve the relief of the poor according to the meaning given to those words by the society's rules and known to the testator.

Nash v. Inman. [1908] 2 K. B. 1. (C. A.).

Infant—Supply of necessaries to—Suit for—Onus of proof.

In an action for price of goods supplied to an infant " the plaintiff has to show, first, that the goods were suitable to the condition in life of the infant, and secondly, that they were suitable to his actual requirements at the time, or, in other words, that the infant had not, at the time, an adequate supply from other sources."

West v. Bristol Tramways Co. [1908] 2 K. B. 14. (C. A.)

Nuisance—Laying tramway under statute—Paving road of tramway with creosoted wood—Injury to plaintiff from creosote fumes—Right of suit.

The defendants who were authorized by a statute to lay a tramway and for that purpose to pave the tram road with wood, used creosoted wood, whose fumes injured the plants and shrubs of the plaintiff, a neighbouring gardener. *Held* that the defendants, apart from any question of negligence, were liable for consequences of a non-natural user of the land, and that, as the statute authorized them to use only wooden pavement, they were bound to see that the kind of wooden pavement used was harmless to others.

[*Rylands* v. *Fletcher*[1] followed.]

Johnson v. Kearley. [1908] 2 K. B. 82.

Broker—Principal and agent—Agent's right to indemity—Payment without authority.

D (Defendant) asked *P* (Plaintiff) a broker, to buy for her certain stock. *P* bought them through the brokers of London Stock Exchange who themselves bought the same through a jobber

1. (1866) L. R. 1 Ex. 265 and (1868) L. R. 3 H. L. 330.

and added to the jobber's price some amount for their trouble and notified the total, calling it *net*, to *P*. *P*, without getting himself informed of the exact amount added, though he knew that there was some addition, and without informing *D* of the addition, paid for the shares and sued *D* for the sums paid :

Held (1) that, "if there existed a custom on the Stock Exchange that in such cases the London brokers could add something to the jobber's price by way of remuneration or profit and call it 'net' without even disclosing to the other broker what that addition was, the principal (*D*) might be liable even although she was ignorant of the custom"; (2) that no such custom was proved; and (3) that *P* could not recover even such amount as remained after deducting the addition, for, "to succeed in this action plaintiff must prove that he has carried out his client's instructions, and that the moneys that he has paid for her were paid within the authority with which she invested them, and having knowingly departed from his instructions, he is * * * not entitled to succeed at all in this action that he has brought."

Per Curiam.—"A broker when acting as an agent must faithfully and accurately inform his client what the real transaction is that he has made for him, and in default of his doing so he cannot recover in an action against him, the keynote of which is that he seeks indemnity from him for moneys paid for him in obedience to his instructions. The implied contract of indemnity in the case of principal and agent is that the principal will indemnify the agent against liability incurred by him under the contract which he is instructed to make by his principal, but not against a payment made by him without authority."

The Gramophone and Typewriter, Ltd. *v.* Stanley.

[1908] 2 K. B. 89 (C. A.)

Income-tax—English Company owning all shares in a German Company—Control—Separate existence of German Company—Part only of German profits remitted to England—No tax for the rest.

"The acquisition of the whole of the shares of a (German) corporation by one individual (an English Company) does not of itself alter the nature of his relationship to the corporation. His *de facto* control when he possesses 98 per cent. is probably

complete from a practical point of view, and although it is, no doubt, rendered more complete in theory when he possesses himself of the whole of the shares, it is still of the nature of a control exercised by corporators over the corporation, and does not make him and the corporation in any sense identical. The directors of the corporation do not become his agents. The duties are still controlled by the rules and constitution of the corporation itself. Nor is this consideration one of theoretical law only. The fact that the whole of the shares of the corporation are held by one individual at one moment by no means implies that they will be so held at a future time, and the responsibility of the directors and officers of the corporation is to the corporation itself whatever be its composition at any moment as to number of corporators. This (the holding of all the shares) is insufficient in itself to make the business of the foreign Company a part of the business of the English Company. The shares remain possessions in that foreign country. Duty (income tax), therefore, is payable on so much of the profits of the German Company as are remitted to the English Company by way of profits or dividend, and the sum of £ 15,000 which unquestionably was not so remitted is not chargeable with duty."

Arnould & Butler *v*. Bottomley. [1908] 2. K. B. 151. (C. A.)

Libel—Justification—No particulars—General allegations of fraud—No right to inspect books to fish out.

"A defendant in a libel action who pleads justification must state in his defence or particulars the facts on which he relies to prove such justification, and he can obtain discovery (of plaintiff's books) only in respect of such facts so stated." "As the defendants by their pleading rely on fraud the particulars must allege the fraud distinctly, for 'general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'" "The defendant is not entitled to discovery and inspection of the plaintiff's books in order to find, if he can, evidence of the particular transactions which are not mentioned or even referred to in any part of either set of particulars."

Crozier, Stephens and Co. v. Averbach.

[1908] 2 K. B. 161 (C.A.)

C. I. F. contract—Goods not according to sample—Breach at foreign port by a foreigner—Jurisdiction.

When goods, which are not according to sample, are shipped at a foreign port by a foreigner, carrying on business and resident abroad, under a *C.I.F.* contract to a purchaser in England, the purchaser becoming the owner thereof and undertaking all risks from the moment of shipping, the breach of not supplying according to sample occurs at the foreign port and not in England, *i.e.*, the place of delivery, for the, *C.I.F.* contract contemplates that the seller is to discharge his part of the contract by performance at the port of shipping, though the buyer has to perform his part of of the contract, *i.e.*, payment at the port of delivery.

Under such circumstances no suit could lie in England against such a foreigner for breach of contract, for the breach was out of the jurisdiction.

In re **Pope**—*Ex parte* **Dicksee.** [1908] 2 K. B. 169 (C.A.)

Bankruptcy Act 1883 (46 *and* 47 *Vict. C.* 52) *S.* 47—*Post-nuptial settlement—Compromise of matrimonial offences.*

Held by the Court of Appeal (*Buckley* L. J. dissenting) that a post-nuptial settlement on the wife within two years preceding the bankruptcy in compromise of proceedings taken by the wife for matrimonial offences, is good as against the trustee in bankruptcy as the wife was "a purchaser in good faith and for valuable consideration" by *surrendering* her rights against the husband which, if pursued, would have involved the husband in payment of costs and alimony, and would have subjected him to a public exposure in the Divorce Court.

Bank of England v. **Cutler.** [1908] 2 K. B. 208 (C. A.)

Transfer of stock in bank—Mistaken identification—Forged transfer—Loss to the bank—Liability of identifier.

The plaintiff bank, which was under a statutory liability to transfer stock whenever required by stock holders, was in the habit of transferring stock if transferors were identified by particular kinds of persons. The defendant, being one of such persons,

mistakenly identified *A* as the owner of certain stocks while *B* was the real owner whose name was forged by *A* in the transfer book. The transferee having transferred the stocks to *bona fide* purchasers for value, the bank sustained loss and sued the defendant for the same :

Held by the Court of Appeal (*Vanghan Williams* L. J. dissenting) that the following acts of the defendant, taken together, amounted, on the part of the defendant, to a request to the bank to transfer the stock, and made him liable to indemnify the bank:—" The drawing up of the ticket (showing the name of the transferor, the transferee and the thing transferred), the taking it to the bank, the payment of 2*s*. 6*d*. to get the transfer expedited and made ready on the same day, the attendance at the bank with the proposed transferor, and the identification of the forger as the stockholder."

[*Starkey* v. *Bank of England*[1] and *Sheffiled Corporation* v. *Barclay*[2] applied.]

Vaughan Williams L. J.—None of these acts, whether taken singly or in the aggregate, constitutes on the defendant's part a request to transfer. The defendant identified the transferor, *i.e.*, simply " *attested* " the transfer, according to the words used by the books of the bank; there was no warranty as to the correctness of the identity, nor was there any fixed practice that the bank acted only on the identification without making independent enquiries. The defendant was therefore not liable.

Huggett v. **Miers.** [1908] 2 K. B. 278 (C.A.).

Negligence—Building let out in flats—Common staircase in possession of landlord but lighted at several places by tenants—No duty of landlord towards customers of tenants to light staircase.

A common staircase in a building whose several flats were let to various Companies was in the possession of the landlord and was lighted by each Company with their gas in places which were respectively in front af their landings, each tenant's servant putting out his light in the staircase as soon as his Company's business for the night was closed. The plaintiff, who was a frequent visitor to the office of one of the Companies in the second floor,

1. (1903) A. C. 114. 2. (1905) A. C. 392.

as their canvasser, stayed there one night a little too long behind all others, and came down by the staircase when all the lights in front of the second floor and below were put out by the servants of all the Companies and fell down in the dark:

Held that the plaintiff had no cause of action against the landlord, for the latter did not either expressly or impliedly undertake with the tenants to light the staircase, and he was under no duty towards a stranger, *e.g.*, a customer of one of the tenants.

Per Curiam.—" He who has the use of an easement must himself do the necessary repair " unless the grantor binds himself either expressly or by necessary implication.

[*Miller* v. *Hancock*[1] distinguished.]

Hamel *v.* P. & O. S. N. Co. [1908] 2 K. B. 298.

Ship—Damage to ship necessitating repair—Unloading cargo for repair of ship—No common peril—No right to contribution for general average loss.

A ship with some cargo after starting on her voyage returned into dock for repair, being unfit to proceed further, and for the purpose of repair the cargo had to be unloaded:

Held that as there was no peril common to the ship and the cargo likely to involve any general average loss the owner of the cargo had no right to any contribution for expenses of unloading as if upon general average loss.

" To make a general average act there must be a common peril, and there is no general average contribution without a general average act, or an act consequential upon a general average act, and so intimately connected with it as to make it in substance one continuous act done to relieve the whole venture from a common peril. If a consequence of a peril of the sea is merely to render one part of the venture abortive, merely to render the ship unfit to proceed or the cargo unfit to be carried further on the voyage, acts done merely to make the ship fit to proceed or done merely to make the cargo fit to be carried on the voyage are not general average acts and do not afford ground for a general average contribution."

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1 (1893) 2 Q. B. 177.

Dakhyl v. Labouchere. H. L. (Eng.) reported in [1908] 2. K B 325. Note.

Personal libel — Justification —Fair comment— Question for Judge and Jury.

In an action for personal libel for calling the plaintiff, (a medical practitioner), as " a quack of the rankest species " the defendant having admitted skill on plaintiff's part in the article complained of, the Judge simply told the Jury that the word quack meant " a pretender to skill which the pretender did not possess," but did not point out to them the other meanings of the word, such as, " a person who, however skilled, lends himself to medical imposture" and asked them to find for the plaintiff, if, in their opinio the defendant had not established the plea of justification, though the defences were justification and also fair comment:

Held (1) that there was a misdirection, for the defendant had admitted skill on the part of the plaintiff, and the Judge should have directed the Jury as to the other meanings of the word 'quack'; (2) that the Judge should have left to the Jury as to what meaning the word 'quack' in the circumstances of the case conveyed to the mind of the ordinary reader; (3) that in case the Jury found the plea of justification not proved, the Judge should see, as a matter of law, " whether the personal attack in any given case can reasonally be inferred from the truly stated facts upon which it purports to be a comment," but that "if he should rule that this inference is capable of being reasonably drawn, it is for the Jury to determine whether in that particular case it ought to be drawn ;" (4) that the Judge erred in telling the Jury that " unless a justification was proved they were bound to find a verdict for the plaintiff, and that unless justified that libel is not a fair comment and cannot come within the region of fair comment ;" and that (5) therefore the defence should have been given an opportunity of proving that in case the justification failed, there was fair comment in the circumstances of the case.

Per Curiam.—"The plea of fair comment does not arise if the plea of justification is made good, nor can it arise unless there is an imputation on a plaintiff. It is precisely where the criticism would otherwise be actionable as a libel that the defence of fair comment comes in."

N.B. The decision in the above case was followed in *Hunt* v. *The Star. Newspaper Co. Ltd.*[1] whose facts and decision were almost similar to those in the above House of Lords case.

The "Venture." (1908) P. 219. (C. A).

Advance of part of purchase-money—No proof as to on what terms the advance was made—Presumption as to part-ownership.

Where a person is proved to have advanced a part of the purchase money and no counter-evidence is let in as to on what terms the same was advanced, the presumption of law is that he advanced it to become a part-owner in the thing purchased.

Levy v. **Levy** and **De Romance.** [1908]. P. 256.

Divorce—Practice — Foreigner co-respondent — Adultery in England— Writ served out of jurisdiction—Jurisdiction.

The Divorce Court has no jurisdiction over a foreigner co-respondent, resident and domiciled in a foreign country, even if the adultery was committed in England.

Baker *v.* **Baker** and **Dwyer.** [1908] P. 257.

Divorce—Foreigner co-respondent—Practice.

Where a co-respondent is a foreigner resident and domiciled in a foreign country, and the Divorce Court has, therefore, no jurisdiction over him, the practice is for the case to proceed without citing him as a co-respondent.

JOTTINGS AND CUTTINGS.

Translation of documents and Judge's duty to decide its correctness —We think it necessary to draw attention to the habit that some judges have, when the translation of a document put in evidence in a case is impeached by a litigant, of saying that the Court translator's translation must be accepted unless the objector's opponent is prepared to admit the error complained of. We are afraid that Mr. Justice *Davar's* charge to the special jury in the recent Tilak sedition case was in reality dominated by some such view with respect to the errors in translation complained of by the accused, though the learned Judge did not in terms say that

1. (1908) 2 K. B. 302 (C. A.).

the Government or Court translator's translation was conclusive. We think there is absolutely no foundation for the presumption that the Court official's translation must be taken to be correct. It is the duty of the Court to construe every document placed before it, in whatever language it may be, and no judge is justified in throwing the responsibility on any paid translator. If the official translation is impeached, the Court must judge as well as it can, what the real meaning of the passage in question is. Judges are not very rare in this country who find it difficult to decide what the correct law is on many points raised before them, and it would not do for them to say that, if the subordinate Judge, for instance, whose judgment is impeached was not a good lawyer, he would not be holding his office of judge. How is the position more sound that if Mr. X did not know the Telugu language well so as to be able to translate every Telugu passage correctly, he would not be holding his office of Translator, and *ergo* his translations must be correct.

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The Special Jury and the Tilak Sedition Case:—There was one ruling of Mr. Justice *Davar* in the recent Tilak sedition case which we are disposed to think could have been improved upon. The accused objected to a special jury on the ground *inter alia* that the members of the special jury were likely to be ignorant of Mahrathi and would therefore find difficulty in construing the documents which were charged as seditious. The accused represented that the translation of the documents which were articles on political subjects in a language which is now in a growing condition would sometimes be not easy. The learned Judge observed that it was the rule in important cases to empanel a special jury, and that such a course would be to the advantage of the accused himself. We do not suppose that he was not alive to the fact that most of the members of a special jury were likely to be unacquainted with the language of the offending articles, but he apparently thought that this did not matter, though he did not base his ruling on the ground that the translation of the articles was free from difficulty. We think it would have been better if the learned Judge had directed that the jury, whether common or special, should be selected from a list of gentlemen acquainted with the Mahrathi language. This would be but justice to the accused.

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Accused's right to be tried by a jury of his own countrymen or otherwise to dispense with a jury:—In the Presidency Towns, the Indian Law in terms recognises the right of every European British subject to be tried by a jury, the majority of whom is composed of Europeans. Though there is no such provision in the case of other classes of accused, is not the spirit of the law the same and would it be wrong on the part of a Judge to refuse an accused a common jury, if he asks for it on the ground that then he is likely to have a majority of his own countrymen on the jury? If the spirit of the law be different then we think it would be wise on the part of the Legislature to give an accused person the right to dispense with a jury altogether and to ask for a trial by a Judge alone. We may also point out that the present law which enables the verdict of the jury, in a case where a native Indian is concerned, to be overruled by the High Court on a reference by the Sessions Judge is hardly fair, and as a European can always claim to be tried in a Presidency Town where the verdict of the jury is conclusive, however unsatisfactory it may be, there is a legitimate ground of complaint that a distinction is drawn by the law between a European and a Native Indian when it ought not to be the case. There is a further anomaly in the law as in Mofussil Sessions trials an Indian may claim a jury the majority of whom would practically be Indians (S. 275 Criminal Procedure Code).

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Restitution of Conjugal Rights.—Actions for restitution of conjugal rights are fairly common now-a-days, partly because in many of them the object of the petitioner is not to obtain restitution, but to pave the way for divorce proceedings. Consequently there have recently been a number of reported cases in which the effect of a separation deed containing the usual covenant not to sue for restitution has been considered and the learned President had laid down the rule that the existence of the deed is not to be disregarded merely because the other party to the deed does not appear and set it up as a bar. It is the province of the Court, he said, to ascertain for itself whether the deed is still binding on the petitioner. In *Turner* v. *Turner*, which was before the Court last week, Mr. Justice *Bucknell* very properly extended this practice by insisting, in view of serious allegations that the petitioner

had been coerced into executing the deed by her husband, a solicitor, that he should be informed of the matters alleged against him, so that he might have a further opportunity to deny the allegation and defend the suit. The same learned Judge had held last year, in another case, that where a wife had been induced to sign a deed by a threat, that otherwise the husband would make her no allowance for her support and that of her infant child, and that she had no independent advice, she was not to be considered a consenting party to the deed. The facts in *Turner* v. *Turner* were very different, but the petitioner was led to believe that the separation was only intended to be temporary, a threat was made that if she did not sign the deed she would not be allowed to see her children, and, as in the earlier case, she had no independent advice. On these grounds the learned Judge held once more that the petitioner was not a consenting party so as to bind herself contractually. The moral of the two cases is that the legal advisers of any husband who seeks a formal separation ought, in his own interest, as well as in fairness to the wife, to induce her to consult a solicitor. If this be done, it is unlikely that the deed will be executed under circumstances which can lead to its validity being impeached, but otherwise it is always liable to repudiation and attack.—*The Law Journal.*

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Portia in the Trial Scene. – The popular notion of PORTIA in the 'Merchant of Venice' is of an eloquent young advocate, and so she is commonly represented in the trial scene. This is wrong, as a learned Shakespearean commentator long ago pointed out. "In the representation of the scene," he says, "pictorially or on the stage, it seems never to be remembered that PORTIA, throughout the trial, appears as a judge, not an advocate, and that her proper place, therefore, is on the judgment seat rather than on the floor of the Court in front of the stage." In Mr. TREE'S presentation of the piece this view has been adopted, and PORTIA appears on the Bench, beside, but a little below, the Duke. On a careful perusal of the scene it is plain thht PORTIA'S true position is that of a legal assessor to the Court, occupying much the same relation to the Duke as the Recorder of London does to-day to the Lord Mayor. BELLARIO, the learned doctor, has been sent for, as the Duke expressly says 'to determine' the law as to the bond. PORTIA comes in his place, reinforced with his opinion. She takes up at

once the hearing of the case. Each side treats her as a judge. SHYLOCK calls her 'a wise young judge,' and urges her to 'proceed to judgment.' BASSANIO implores her: 'Wrest once the law to your authority,' which could only mean judicial authority. It is PORTIA, and not the Duke, who delivers the judgment of the Court: 'The Court awards it and the law doth give it.' This view of legal assessor is quite consonant with our own early history. The Norman kings administered justice in their own person, now at Westminster, now at Winchester, now at York. The judge, as we understand the term to-day, was at first merely a legal assessor to the King, sitting beside him, as an expert, to advise him as to the law. By degrees, as the business of the Courts increased and law grew more technical, the King withdrew himself from the actual administration of justice, and delegated his functions to his judge, just as the Duke in the play delegates the law of the case to Portia.—*The Law Journal.*

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Discovery in Criminal Proceedings.—At Corwen, May 17, in the course of proceedings for driving motor-cars at excessive speed, the Chairman of the Justices asked a police witness to produce his note-book. The solicitor for the defence was allowed to look at the book, and claimed the right to examine the whole of the book, insisting that it was his right as an advocate, since the book had been put in. The book at best could only be used to refresh the memory of the witness by reference to entries made relating to the case under trial, and the production of such a book does not entitle the opposing advocate to examine any entries except those vouched as refreshing the memory. It is every-day practice to have discovery of parts of a book, sealing up the rest, and no right exists to unseal the rest on inspection without an order of the Court. It is peculiarly inexpedient to allow a roving inquiry through a police officer's note-book, which may contain notes as to many matters which the officer is bound not to disclose except to his official superiors.—*Ibid.*

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Union Society of London.—Lord-Justice *Vaughan Williams*, in responding, spoke with pleasure of the removal of the arrears from the Court of Appeal. He thought that the credit was due first of all to Lord *Loreburn*, as, owing to his action, three Courts of Appeal sat in Michælmas Term; and secondly, to those

Judges—Lord *Halsbury*, the Lord *Chief Justice*, Sir *Gorell Barnes* and Mr. Justice *Bigham*, who had assisted in arriving at the wonderful result which had been achieved. He felt sometimes that as a Judge he was called upon to consider whether one ought not to depart from the old principles, whether of common law or of equity, which they had been accustomed for a great many years to look upon as a sort of bulwark of justice, and he confessed that he found it difficult occasionally to adapt himself to the changing spirit of the times and to accept new bulwarks of justice; but one had to do it. It was idle to pretend that even principles of law were absolutely permanent. The legislature had not regarded some of the old principles as having quite the same force that they had in the old days. In these circumstances he thought it well that Judges should adapt themselves to the progress of the times and of ethics, even to propositions which in the old days were looked upon as very terrible, and which had not occurred to the older men who lived in times when a very much smaller per centage of the people were educated. They had begun to see that those who felt the pinches of the shoe had a right to express their opinion, and that that opinion was worthy of a great deal of consideration.

Lord Justice *Kennedy*, in proposing 'the Bar,' said that the Bar, whatever changes there might be in the spirit of the law, was an institution which was unchangeable in its loyalty to great and wholesome traditions. It was very desirable that in the future, as in the past, the profession of the Bar should be exercised only by those who had a real and personal training in the pursuits and in the studies of the Bar. He ventured to assert that the Bar should press for the improvement of the system of its education, and should insist upon its members having a practical training in the profession, instead of merely seeking to claim its social honor and the esteem of the lay public by the mere passing of examinations. It should press for the necessity of acquiring in barristers' chambers an acquaintance with the real work of the profession, not merely from its studious or literary side, but in its association with those who were engaged in the great work of the profession, so that those who came to the Bar might learn in that way the traditions which, whether on circuit or in London, made the profession what it had been in in the opinion of the country at large. He could not help thinking that a way would be found by which

students should be, he was almost going to say obliged, but should certainly be enabled, to go through a course of practical training, for whether they passed to the Bar through the studentship of an Inn of Court, or through the profession of a solicitor, it was most important that they should be, at least for a time, in the position of learning alike the traditions and the wisdom of the law in the chambers of those who were enabled to give them counsel and advice, both as honorable men and as learned lawyers. He thought much depended at the present moment, when the Bar was being sought by those who, one could not help thinking, were in many cases influenced not by the hope of practical acquaintance with the profession, but by the prospect of appointments, or the prospect of what one might call the advantages of a barrister's position, upon the need that they should pass through that practical apprenticeship which ought to lead not only to their being good lawyers, but good comrades in a profession in which comradeship stood first.—*The Law Journal.* ***

The Judges and the King's Birthday.—While we are heartily in sympathy with expressions of loyalty to the Throne, we find it difficult to understand why it should be deemed proper to celebrate the King's birthday at the Royal Courts of Justice by the cessation of judicial work. This form of celebration, which is quite of recent origin, has not the example of other public departments to commend it. If the Legislature does not regard it as necessary to celebrate the occasion by ceasing to legislate, why should the judges think it essential to display their loyalty by ceasing to administer the law? The late Lord *Coleridge* was wont to remark that the King's birthday could be best observed in the Courts by the administration of the King's justice; and the saying is none the less true because he who uttered it was not invariably distinguished by a scrupulous devotion to his duties on less conspicuous days. The judges, instead of absenting themselves from the Courts, might fittingly celebrate the King's birthday by sitting in their full State robes. An additional reason for regretting the present form of celebration is always to be found in the empty Courts on the day following the King's birthday. Mr. Justice *Sutton*—'faithful among the faithless he'—was the only King's Bench Judge who deemed it necessary to perform his judicial duties last Saturday. ***

Humour of the Law for missed meals.—Samuel Davis, Court Stenographer of the Second Circuit, says, that an Irishman who several years ago tried to engage the legal services of his father, had the oddest ground for a law-suit he has ever heard of. The Irishman wanted to sue his landlady for $ 15. He explained that he made a contract to pay her $ 3 a week for board but she was to deduct 25 cents for every meal he missed, $ 5-25 worth of meals each week, for which his contract required him to pay only $ 3, so that by staying away he made $ 2-25 clear. The landlady refused to pay him his profits and he wanted Mr. Davis to bring suit against her for him. "Father laughed at him a bit," Mr. Davis says, "and he got indignant." "A contharact is a contharact," said Pat, "and she ought to be made to live up to her'n just as well as me to mine." There were several other lawyers in town, and some of them were pretty hard up for cases, but I don't know of anybody that took that one after father turned it down.—*West Virginia Bar.*

A story is going the round of the North Eastern Circuit which deserves (says *The Globe*) a larger circulation. A man was being tried before Mr. Justice Phillimore, at the Leeds Assizes, for causing the death of his wife. "Did you say to your wife, 'If you don't —— well take care you will repent of it'?" the prisoner was asked. "No I could not have said that. I don't use that word —— I don't use that word," he replied. "I suppose," interposed Justice Phillimore, "it is the word beginning with —— that you do not use." "Oh, no," answered the prisoner, "I do use that word. It is the word 'repent' that I don't use." —*The Law Students' Journal.*

CONTEMPORARY LEGAL LITERATURE.

The *Central Law Journal* of 15th May contains an interesting article on the origin, history, use and abuse of the phrase *res ipsa loquitur.*

At the invitation of the American Bar Association an American lawyer writes in the May number of the *Green Bag* an interesting article on "A Code of Legal Ethics" at the end of which he gives a dozen canons which, though not new, are well worth studying.

A learned article in the May-June number of the *American Law Review* headed "Due process of Law and Constructive Crimes" deprecates judicial legislation of crimes under pretence of interpretation of statutes, prohibitive in their nature, ambiguous in the definition of crime, or utterly wanting in such definition, and concludes as follows:—"It follows from the fact that justice can only deal with material factors that an offence to be real and not merely constructive must be conditioned upon a demonstrable and ascertained material injury, or an imminent danger of such, the existence of which danger is determined by the known laws of physical universe. Our Constitution, both in its guarantee of freedom of speech and press, and in its guarantee of due process of law (as we now understand the law) precludes the construction of mere psychologic crimes. The offences which are based only upon ideas, expressed or otherwise, such as constructive treason, witch-craft, and heresy, either religious or ethical, and all kindied psychologic or other constructive crimes, are prohibited. The very nature of *the law*, whose supremacy and processes our Constitution guarantees, is such that American legislators cannot be permitted to predicate crime upon mere psychologic factors." The article is well worth perusal, especially here in India, at the present day, when deportation without any formal trial for imaginary and unpublished offences and legislation based upon sedition-phobia which declares criminal, acts till now regarded as legal, seem to be the order of the day.

A learned writer in the *Harvard Law Review* (May, 1908) truly observes:—"The doctrine against the clog on the equity of redemption seems one of the striking examples of the great truth that the ethical standard of our law is often higher than the average morality of the commerical community." The law on the subject, like that relating to the Equity of Redemption itself in an earlier period, is an interference, on grounds of public policy, with the right of parties to a mortgage to agree as they please. "Once a mortgage, always a mortgage, and *nothing but a mortgage*" is the maxim of the law, whatever the parties may choose to stipulate. Lenders often cast about for devices to secure the ultimate *extinction* of the right of redemption and the acquisition of the mortgaged estate by themselves. These devices have been effectually thwarted by the law. Attempts to *restrict* the equity of redemption have likewise been held void. Courts have also

refused to give effect to stipulations *in the mortgage deed* that the mortgagee may purchase the interest of the mortgagor *on such terms as are therein agreed*—*Samuel* v. *Jarrah Timber Corporation.*[1] If, however, the *mortgage* transaction leaves the mortgagor unfettered in respect of his *equity of redemption*, subsequent and even contemporaneous but independent transactions between the mortgagor and the mortgagee in respect of the equity of redemption are judged by principles well known in other branches of the law. The law, no doubt, looks at them with a suspicious eye, but they are not forbidden, if fairly and honestly entered into—see *Reeve* v. *Lisle.*[2]

The law as to collateral advantages or by-agreements is more complicated. Much of this branch of the law has been settled by the decisions of the House of Lords in *Noakes & Co.*, v. *Rice*[3] and *Bradley* v. *Carret.*[4] The equity of redemption is protected as much from being *indirectly* fettered as from direct clogging. The debtor must be at liberty to repay the money when it falls due or whenever he pleases, and on such repayment he must emerge from the transaction as free in his ownership as he was before. This is the real test, and not the one sometimes stated, *viz.*, whether *during the currency* of the mortgage, the mortgagor is subjected to various burdens. A collateral bargain may be unconscionable, and on that ground unenforceable. But apart from that, the mere fact of some collateral advantage is not, according to modern authorities, fatal in itself, unless it can be shown to be a fetter upon the equity of redemption as well—*Biggs* v. *Hoddinott.*[5]

An article in the *Harvard Law Review* for June, 1908, discusses some points relating to warranty in the Law of Sales. The principal question always is, what statements make a seller liable for the character or quality of the goods sold. The early law gave effect only to *express* warranties, and sometimes the use of the word "warrant" or of other equally direct and positive language was considered necessary. The law of *implied* warranties was a later development that grew up first in connection with affirmations of title, and then with reference to warranty of quality also.

1. (1904) A.C. 323.
2. (1902) A. C. 461.
3. (1902) A.C. 24.
4. (1903) A.C 253.
5. (1898) 2 Ch. 307.

The learned writer draws prominent attention to the fact that at the outset the action on a warranty was conceived of as an action of tort based on deceit. Though later the action was declared *in assumpsit* and has now come to be contractual, light is thrown on many questions in the present law by considering that the action of warranty may be sound in tort rather than in contract. The author illustrates this by reference to the rules relating among others to (1) the *intention* to warrant; (2) the restriction of warranties in the older cases to *existing* facts as distinguished from undertakings as to future conditions; (3) non-warranty in respect of 'obvious defects'; (4) the admission of parol evidence as to warranties in spite of the existence of a written contract of sale—see *De Lassalle* v. *Guildford*;[1] (5) the effect of statements made *previously* to the bargain which cannot be regarded as part of the contract of sale.

Some cases require an 'intention to warrant' on the part of the seller; but this is not an intent to *contract*, but an intent to make a statement as matter of fact rather than as matter of opinion. The tendency of the best modern authorities is, however, stated to be to avoid the use of the word 'intent' in this connection. The gist of the action on warranty is the affirmation of the seller inducing the sale; the seller's knowledge is immaterial, nor is any fraudulent intent necessary. An affirmation or representation that cannot in any sense be regarded as contractual may, nevertheless, form a ground of liability. All that seems necessary is that the affirmation should have been such as to lead a reasonable man to believe that a statement of fact was made to induce the bargain. The distinction, therefore, is between affirmations of fact and statements of opinion. The line is difficult to draw; and the test sometimes stated, *viz.*, that if the statement is in regard to something of which the buyer is ignorant and relies upon the seller for information, it would be a warranty, but if the matter was one in regard to which the buyer had as good opportunity as the seller and was as competent to form a judgment, the statement of the seller would be regarded as mere matter of opinion, is not complete or conclusive. The continual tendency of the law is stated to be to restrict the seller in regard to untruthful puffing of his wares. Once the theory of an intention to warrant is got

1. (1901) 2 K.B. 215.

rid of, it is easy to see that even *descriptive* statements may and do constitute a warranty.

Reliance of the buyer upon the seller's statement is an important requirement of the law of warranty, whether viewed from the standpoint of tort or of contract. The warranty, however, need not be the *sole* inducement to the buyer to purchase the goods. And as a general rule no positive evidence of reliance by the buyer is necessary other than that the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods. But the theory of reliance is intimately connected with several difficult questions, such as, the cases relating to obvious defects, the effects of inspection, actual or possible, and the effects of statements made previously or subsequent to the bargain.

A warranty in general terms is held not to cover defects which the buyer must have observed, unless the seller has successfully used arts to conceal the defects. Under the contractual aspect of the law, there may, however, be express warranties even in respect of known defects. Statements made long prior to the sale may nevertheless operate as an inducement to the sale and may therefore amount to warranties; but a statement subsequent to the sale cannot have any effect unless it can be upheld as a separate *agreement* supported by an independent consideration.

An article in the *Yale Law Journal* (May, 1908) gives an interesting *resume*, both historical and comparative, of 'Recent European Legislation with regard to Compensation for Industrial Accidents.' Having regard to modern industrial conditions, the learned writer considers that it is not sufficient merely to impose a liability on the employer and help the workman as far as possible in enforcing it. Following the German precedent, "it seems that the proper function of the State is to organise, either by State institutions, or by State supervision, a safe and satisfactory system of insurance" for workmen.

In the same Journal Dr. Sherman, Assistant Professor of Law in the Yale University, gives a brief account of the Roman system of legal education. The golden era of classical jurisprudence was the era of *private* law schools. The Roman jurisconsult not merely answered legal questions, acted in Courts and

drew up proceedings; he wrote on legal subjects and taught law as well to his following of students. The Sabinian and Proculian Schools gave instruction after the traditional fashion : "which was to allow young men to be present as listeners while the jurists gave opinions, and to permit them to see how they conducted their law business, occasionally arguing with the pupils but rarely giving private instruction by means of connected lectures." Later, this practical instruction was supplemented by teaching the students the elements of law or 'Institutes.' By the third century after Christ, Schools of Law had spread over the empire, but they had no State support. In the time of Diocletian, State recognition was extended to some of them. An enactment of Theodosius the Younger (425 A.D.) established a University at Constantinople, instituted two Professorships in Law, required the Professors to give public lectures, and forbade all other persons to do so. Some of the law schools were suppressed by Justinian, but those in Rome and Constantinople flourished, and later on, in the eleventh century, the law schools at Ravenna also helped to preserve the tradition of the legal teaching of the Roman Empire until the rise in the 12th century of the famous Law School of Bologna.

Under the later empire, legal training no longer followed the whim of the particular teacher. Students were obliged to study prescribed books in a certain order. Candidates for admission to the bar were required to pass a public examination. The course of study consisted of three years of professional instruction and two additional years of private study. Justinian prescribed that the students should be taught from the Justinian law books. He also legislated for the government and discipline of the student body. For three centuries prior to Justinian, the law student began his labors with two books of Gaius' Institutes and his four books on Wife's Property, Guardianship, Wills and Legacies; in the second and third years he took the Prætor's Edict and Ulpian's Commentary thereon, and also read eight out of nineteen books of Papinian's answers; in the fourth year he read the Answers of Paulus, and in the fifth, the Imperial Statutes. Under Justinian's programme, all students of law were required to study the entire Corpus Juris within the five years. For the first three years, the Institutes and the first five parts of the Digest were to be taken under professional instruction,

while the last two years were spent in reading the rest of the Digest and the whole Code in private study.

The course of instruction was a 'concentric system.' In the first year, the student got a bird's-eye view of the entire field of law; the remaining years he devoted to repeatedly going over and reviewing the whole ground, widening and deepening his knowledge of law. The student first received a thorough drilling in the elements and principles of the law, and then followed the application, inductively, of what he had previously deductively acquired—in other words, he learned how to apply legal principles to states of fact.

To us, just now, the story is not without its lessons.

BOOK REVIEWS.

The Indian Contract Act: By Cunningham and Shephard, Tenth Edition: Published by the Lawrence Asylum Press, Mount Road, Madras: Price Rs. 18-0-0.—It is hardly necessary to say anything in praise of a book that has already gone through so many as ten editions. Since the last edition, however, other books have come into the field, particularly that of Messrs. POLLOCK and MULLA. The plan adopted in the book under review is very different from that adopted by Messers. POLLOCK and MULLA, and this plan has not been deviated from in any way in the present edition. The plan apparently is to collect the cases for the lawyer without attempting to criticise them or to discuss the principles involved in them in relation to the language of the sections. Except in a few instances there is also no attempt to point out the difficulty in the language employed in the sections. The recent decisions have been noted, but only those that have appeared in the authorized reports. There have been important decisions of late on some of the sections of the Contract Act which have been reported in the unauthorized reports, but, as these have not been called to aid, they do not find a place in the book. The decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*[1] that a minor's agreement is void is referred to; but there is no discussion as to the effect of this decision. The question whether a minor on attaining age can validly ratify an agreement entered into by him during his minority, which has become important since the decision

1. (1902) I.L.R. 30 C., p. 539.

of the Privy Council, is incidentally referred to without any attempt at solving it. It is not necessary to remind our readers that this question has been ably dealt with by Sir *Subrahmanya Aiyar*, J. in *Indran Ramaswami Pandia Thalavar* v. *Anthappa Chettiar and others.*[1]

An Analysis of Williams on the Law of Real Property: By A. M. WILSHERE, L.L.B. of Gray's Inn and the western circuit, Barrister at Law, London, Sweet Maxwell Ltd., 3 Chancery Lane 1908 Demi 8vo pages vii and 135 Price 5 *s.*—The book, as its title and preface indicate, is merely an analysis of Williams on Real Property which itself has long been a Students' Text Book on Property, but has now been displaced by Mr. Goodeve's work. The author rightly sounds in the preface a warning note to the students, to whom it is mainly intended, that it is merely a note book intended to assist a student who has read the bigger work. As it often happens in such cases, however, the book will be used as a cram book although the author may never intend it. The author, by this work, has only done what a student reading Williams' Real Property should have done. We are of opinion that such works as these should not be published as they are liable to misuse in the great majority of cases, and lecturers especially should not be privy directly or indirectly to anything which is likely to serve only as a cram book.

The Law of Real Property: By A. F. TOPHAM, LL. M. of Lincolin's Inn, Barrister-at-Law with test questions for the use of students: By F. Poshar Fausset, B. A. LL. B., London, Butterworth & Co., 11 & 12, Bell Yard, Temple Bar, Law Publishers: Price 12 *s.* 6 *d.*—This is a students' book on Real Property. It gives the outlines of the subject, and is intended to be introductory to other bigger books. We trust that the book will be found useful by the class of readers for whom it is mainly intended.

Law of Tender: BY GEORGE LUCAS BEYNON HARRIS of Gray's Inn and the Oxford Circuit, Barrister at Law, London: Butterworth & Co, 11 & 12 Bell Yard Temple Bar: Law Publishers: Price 21 *s.*—Specialization in law is growing rapidly apace, and this book is a result of this specialization. The law of tender is a very small branch of the law. One would have doubted whether there was much to be said upon it, much

1. (1906) 16 M.L.J. p. 422

less whether there was anything in it to assume the form of a treatise. The present work sufficiently refutes these doubts and proves also the importance of the subject The word "Tender" has been applied in the law to different and distinct matters—from the tender in the contract of debt to the tender of evidence. The book is, therefore, divided into five parts—the first part treating of tender in the contract of debt; the second dealing with the tender of amends, which is, according to certain statutes, a qualified protection to public bodies, etc. ; the third part dealing with tender in the contract of sale ; the fourth part dealing with tender of contract money, and civil and criminal processes ; and the fifth part dealing with certain miscellaneous matters, among which is included tender of evidence. The first and the third parts are the most important portions of the work. The table of cases shows the remarkable growth of precedents in this branch of the law. The learned author states the principles governing the subject clearly and concisely. We have no doubt the book will be of great use to the members of the profession.

The Transfer of Property Act: By DESAI, B.A., L.L.B. : Price Rs. 4, published by Lawyer Office, Girgaon Back Road, Bombay.— This is a students' book. On the Transfer of Property Act there is commentary specially adapted for the students. Gour's book is rather voluminous and even Shephard's book is too much for a student and certainly is not written in such a way as to be handled by the student. A students' book is, therefore, a great *desideratum.* Mr. Desai's book purports to supply this want. The commentaries are brief and arranged in such a way as would appear to be helpful to the student. One essential requisite in a book like this is that the law should be accurately stated and that, as far as possible, the law should be enunciated from the principles of recent decisions. We cannot say that we are satisfied that Mr. Desai has throughout done this. For instance, in page 146 when dealing with the question of limitation for enforcing the vendor's lien he states that the period is three years under article 111. He relies for this view on two cases *viz.*, *Avuthala* v. *Dayamma,*[1] *Seshachala Naikar* v. *Varadachariar.*[2] He might have added *Natesan Chetty* v. *Soundara Raj Iyengar,*[3] *Subramani Ayyar* v. *Pooran*;[4] but this view, however, is no longer law—see

1. (1900) 24 M. 233.
2. (1901) 25 M. 55.
3. (1897) 21 M. 141.
4. (1901) 27 M. 28.

Ramakrishnier v. *Subramania Iyer*;[1] *Munirunnissa* v. *Akbhar Khan*,[2] which proceeded upon the principle enunciated by the Judicial Committee in *Webb* v. *Macpherson*. These two cases are referred to by Mr. Desai in his appendix. The decisions, however, are long prior to 1907. Although the preface mentions a Table of Cases we do not find any. We hope, however, the book will be found useful by the student and that Mr. Desai will remedy these defects in his second edition.

Acknowledgments.

We beg to acknowledge receipt of the following publications.—

Law of copyright in Designs by Lewis Edmunds and Herbert Bentwich. Second Edition 1908. Price 25 s.

An Analysis of Williams on the Law of Real Property by A. M. Wilshere, B.A., LL.B. First Edition

Transfer of Property Act by T. R. Desai. First Edition. Price Rs. 4.

Allahabad Law Journal for	July 1908.
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do.
Hindustan Review	Do.
Central Law Journal	Do.
Chicago Legal News	Do.
Criminal Law Journal	Do.
Harvard Law Review	Do.
Kathiawar Law Reports	Do.
Law Students' Helper	Do.
Law Students' Journal	Do.
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.

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1. (1905) I. L. R. 29 M. 305.
2. (1908) I. L. R., 30 A. 172.